STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CHARLES PITTS,
Plaintiff-Appellant

v

SUSAN BEAM,
Defendant-Appellee.

SUPREME COURT CASE NO: 128374

COURT OF APPEALS CASE NO: 260426

GENESEE CIRCUIT COURT
FAMILY DIVISION: 02-243658-DP

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128374

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE

STATEMENT OF SERVICE

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STATEMENT OF ISSUES

1. Does the allegation in plaintiff's October 16, 2001 Complaint for Paternity that "the Defendant was not married at the time of conception {of the minor child}, nor at the time of birth of the minor child, " constitute fraud on the court within the meaning of MCR. 2.612(C)(2)?

   The Defendant-Appellee states "Yes".

2. Was the above issue abandoned by the Defendant on appeal to the Court of Appeals?

   The Defendant-Appellee states "No".

STATEMENT OF FACTS

A Complaint for Paternity was filed with the court and signed by Charles Pitts on October October 16, 2002. Mr. Pitts is represented by counsel but she does not sign the Complaint. In the Complaint it is alleged in paragraph five (5) the "Defendant was not married at the time of conception, nor at the time of the birth of the minor child". It is undisputed that the Defendant Susan Beam was married to George Alan Beam from 1982 until January 25, 2001, when he died. The minor child that is the subject of this case, Nia Michelle Beam, was born January 17, 2001, yet it is unclear why paragraph three (3) of the Complaint for Paternity originally had February 17, 2001 as the date of the minor child's birth instead of January. It is not clear who crossed out February and put January, but it is curious that the Order of Filiation also contains the February 17, 2001 birth date.

The Summons contains a checkmark where it says "there is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family of family members of the parties, yet there was a case entitled Petition for Name Change, Case No: 02-238641-DP which had been filed with the Genesee County Circuit Court and Judge Duncan M. Beagle was assigned. Within the pleadings of this case is a consent signed by Charles Pitts to give the minor child, Nia, the name Nia Beam. The original birth certificate given to the court shows the father as George Alan Beam DOB June 24, 1955. Charles Pitts' age is approximately 60 years.

The Court on December 16, 2002 by the Honorable Judge Duncan M. Beagle takes testimony from Charles Pitts (Transcript Page 5 lines 19-24):

THE COURT: ...Do you want to raise your right hand? Do you solemnly swear or affirm that the testimony you're about to give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

THE PLAINTIFF: I do, Your Honor.

THE COURT: ....Is it true that at the time of this conception that neither you or the defendant were married?

THE PLAINTIFF: That's true. (Transcript Page 6, lines 19-22).

During the brief testimony of Charles Pitts he tells the Judge that the Mother has moved and that she receives social security but does not tell the court who's social security! The minor child was receiving her dead father George Alan Beam's social security. Counsel for Charles Pitts continues: (Transcript Page 9 lines 14-18)

MS. JOHNSON: Your Honor, originally the Court – the record should reflect that he was listed I believe as – on the birth certificate, is that right?

THE PLAINTIFF: Correct.

In the transcript on the last page (page10) the Judge makes findings that " Charles Pitts is the biological father of the child mentioned, born February 17, 2001". Charles Pitts or his counsel does not correct the Judge. It is not clear who changed February to January on the Order of Filiation. It appears to be the Judge's writing, but when was never discovered. It is the Mother's position that the complaint was filed with the date of birth being February to side step the fact that she was married until January 25 of that year.

Charles Pitts continues to state to the court that the minor child had his name at birth and that he knows this because he saw the birth certificate. There is no doubt that Charles Pitts knew Susan Beam was married. The birth certificate of Nia that he saw had George, her husband, listed as the father. In fact, Charles Pitts is never issued a new birth certificate with himself listed as the father because the Division for Vital Records, Michigan Department of Community Health refuses to issue a birth certificate listing Charles Pitts as the father even with the Order of Filiation. Though the court receives a letter of explanation from the Vital Records Department on July 31, 2003 stating George Beam is the father, the court sends a certified copy of the Order yet the birth certificate is never issued.

What proceeds after this is a long line of procedurally incorrect methods of gaining full custody and a pick-up order of the now three year minor child. It is true that the Mother, Susan Beam, was originally served with the Summons and Complaint. She read the lies that were alleged and when she was instructed by the same counsel who represented her in the Petition for Name Change he tells her not to worry about it and go on to Pennsylvania to be with her parents. The hearing that was held on December 10, 2003 consisted of questions by the court, no cross-examination and summaries by counsel. A more thorough hearing could have revealed much more to this court, including, but not limited to the continued lack of service of documents including the Order of Filiation and Notice of Hearing that should have accompanied it. The "Default" Order of Filiation was never properly served on the Mother. The Mother never received any of the documents filed by Charles Pitts. The proofs of service are procedurally defective. Charles Pitts knew Susan Beam went to live with her parents. That certainly would not be difficult for any detective to find.

The child is two (2) years of age before Charles Pitts obtains an Order of Filiation. Charles Pitts never supported this child or cared for this child; even the Order of Filiation does not provide support. Susan Beam, her husband Dan Capanzzi (since 11/15/03) and her three children are a family unit and until Nia was wrenched from their home with a pick-up order Charles Pitts was no one this family unit had known or remembered. It is inconceivable that Susan Beam would have disregarded any order from a court allowing Charles Pitts to have parental rights had she known of them. Her immediate reaction to the pick-up order was to hire a an attorney in Florida and one here in Michigan without hesitation.

Charles Pitts lied to the court and further continued extrinsically perpetrating a fraud on this court by filing defective service of process documents. Surely his behavior would toll any one-year limitation under MCR 2.612(C).

SUPPLEMENTAL BRIEF

The minor child was born January 17, 2001. After the minor child was one year and nine months old a Complaint for Paternity was served October 25, 2002 as the file reflects while Mother was in the process of moving to Pennsylvania to live with her parents. The Order of Filiation was signed by the Court on December 16, 2002. There is no record in the file that service of this Order was made on Susan Beam. When she actually learned of the Order of Filiation Mother immediately sought to set this Order aside. Susan Beam filed through her counsel a Petition to set aside the Order of Filiation on December 2, 2004. Since October of 2002 Susan Beam lived in another state with this minor child and her siblings. She had no knowledge of the documents filed by Charles Pitts as she was never properly served with any of them. On motion and on just terms, the court may relieve a party of the legal representative of a party from a final judgment, order, or proceeding on the following grounds MCR 2.612(C)(1):

(a) Mistake, inadvertence, surprise, or excusable neglect.
(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
(d) The judgment is void.
(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is base has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
(f) Any other reason justifying relief from the operation of the judgment.

MCR 2.612 is derived from GCR 1963, 538. Section 528 of the 1963 Court Rules was based on Rule 60(b) of the Federal Rules of Civil Procedure. The federal courts have generally held that ordinary negligence of a party's lawyer is not grounds for relief under Rule 60(b)(1).

Some courts granted relief where there is gross negligence by counsel and an absence of neglect by the party. Most of the federal cases considering the mutually exclusive construction of Federal Rule 60(b) recognized in *Heugel v Heugel*, 237 Mich App 471, 603 NW2nd 121 (1999), involve a party who might have satisfied subsections (1), (2), or (3) (mistake, inadvertence, excusable neglect, newly discovered evidence or fraud) of rule 60(b), but failed to act within the one-year limitation period. MCR 2.612(C)(2) similarly provides a one-year limitation period for corresponding subsections (a), (b), and (c). The United States Supreme Court, in *Pioneer Investment v Brunswick*, 507 US 380, 113 S Ct 1489, 123 L Ed 2d 74 (1993), held that a party who failed to take timely action under Rule 60(b) may not seek relief more than a year after the judgement by resorting to subsection (6), which is not subject to a one-year limitation.

The United States Court of Appeals for the Sixth Circuit observed:

> The difficulty in interpreting subsection (b)(6), and perhaps the reason for the paucity of decisions in this area, arises from the fact that almost every conceivable grounds for relief is covered under the first three subsections of Rule 60(b). The "something more," then, must include unusual and extreme situations where principles of equity mandate relief. Olle v Henry & Wright Corp, 910 F2d 357, 366 (CA 6; 1990).

In the instant case the Mother had reasonable assurance from her attorney that Charles Pitts would not be able to proceed the way he did and it was reasonable for her to rely on that advice. Charles Pitts filed pleadings that were intrinsically fraudulent and filed proofs of service that were extrinsically fraudulent as they never really reached the Mother. Fraud which actually prevents the other side from having an adversarial trial on a significant issue is an example of extrinsic fraud. Such an example would be with regard to filing a return of service. *Rogoski v Muskegon*, 107 Mich App 730, 736; 309 NW2d 718 (1981). There is both extrinsic

and intrinsic fraud in the matter before the court. Intrinsic fraud is a fraud within the cause of action itself. An example would be perjury. Charles Pitts lied to the court and through counsel filed defective proofs of service. Charles Pitts misled the court into believing that Susan Beam was hiding from him, when in fact she was financially burdened and had to go live with her parents. Charles Pitts never financially provided for the minor child but led the court to believe he did.

The Plaintiff-Appellant raised his defense of MCR 2.612(C)(2) one year time limit for the first time on appeal to the Supreme Court. It was not raised in the trial court and Charles Pitt's responsive pleading even admitted he knew the Defendant was married at the time of conception and birth of the minor child. His responsive pleadings never raised an affirmative defense of Mother's failure to set aside the Order of Filiation within one year. His time to raise the issue was in his first responsive pleading. There was no objection to the filing of the petition on the grounds of delay. Under MCR 2.111(F)(3), affirmative defenses must be raised in the responsive pleading unless the previously have been raised in a motion for summary disposition before the filing of a responsive pleading MCR2.111(F)(2)(a). The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Campbell v St. John Hosp.*, 434 Mich 608, 616; 455 NW2d 695 (1990). Charles Pitts should be estopped from raising it for the first time in his appeal to the Supreme Court. Though Charles Pitts never sought to raise an affirmative defense of timeliness it appears from the record that he believed this was a question of law and that he would prevail on the sole reasoning that he gave life to this minor child.

Although highly emotional, the real issue was whether the circuit court properly determined that it did have jurisdiction to enter the Order of Filiation because plaintiff did not have standing, the allegations in the paternity complaint being untrue.

Defendant-Appellee states she did not abandon the issue of fraud on appeal to the Court of Appeals. She believes you cannot separate fraud from the issue of standing as the Plaintiff perjured himself before the court and in his pleadings. All necessary facts were presented to the Circuit Court and to the Court of Appeals. The elements of fraudulent misrepresentation are that the declarent made a material misrepresentation, the representation was false, when making the representation the declarent knew or should have known it was false, the declarent made the representation with the intention that the induced party would act upon it and the induced party acted upon it and suffered damages as a result. *Novak v Nationwide Mut Ins Co.,* 235 Mich App 675, 688; 599 NW2d 546 (1999). In this case all is true. There was never a hearing on the financial hardship the Mother was placed when the social security benefits were stopped because of the entry of the Order of Filiation. The court will consider such consideration of issue not properly preserved for appellate review if such consideration is necessary to a proper determination of the case and the issue to be decided is a question of law and all facts necessary for its resolution have been presented and failure to consider the issue will result in manifest injustice or a miscarriage of justice. *Huegel v Huegel,* 237 Mich App 471, 603 NW2d 121 (1999).

CONCLUSION

That fraud was an integral part of Plaintiff's actions and should not be denied. His

That fraud was an integral part of Plaintiff's actions and should not be denied. His deliberate lies goes to the heart of the Complaint and the issue of standing is one of law and should be recognized. Defendant never waived the issue because she did not formally brief MCR 2.612(C)(2). Plaintiff's failure to plead this court rule in her first responsive pleading was a waiver of the one-year limitation in favor of Defendant/Appellee.

Respectfully submitted,

Dated: November 23, 2005

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